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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 419

PLANKINTON PACKING COMPANY, PETITIONER

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the Supreme Court of the State of Wisconsin (R. 238-245) is reported at 255 Wis. 285, 38 N.W. 2d 688. The opinion of the Circuit Court of Milwaukee County appears at pp. 101-112 of the printed record. The Decision and Order of the Wisconsin Employment Relations Board appears at pp. 210-212 of the record.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1257 of Title 28, U.S.C.

QUESTION PRESENTED

The question presented is whether a state labor relations board may constitutionally exercise jurisdiction to restrain and remedy, as an unfair labor practice under state law, conduct which is declared to be an unfair labor practice by the National Act, when such conduct arises in an industry subject to the National Act, and involves an employer over whom the National Board has consistently exercised jurisdiction.

STATUTES INVOLVED

The pertinent provisions of the Wisconsin Employment Peace Act are set forth in the Appendix to the Petition for a Writ of Certiorari, p. 23. The pertinent provisions of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. 151 *et seq.*, and of the Act, as amended, 61 Stat. 136, 29 U.S.C. Supp. II, 141 *et seq.*, are set forth in the Appendix, pp. 10-13.

STATEMENT

Plankinton Packing Company, a wholly owned subsidiary of Swift & Company, operates a meat packing plant in Milwaukee, Wisconsin. Approximately 45 percent of the materials processed by the Company are shipped to it from points outside the State of Wisconsin and 64 percent of the Company's finished products are shipped outside the state (R. 146). The National Labor Relations Board has consistently exercised jurisdiction in cases involving the Company and its employees. *Matter of Plankinton Packing Co.*, 5 N. L. R. B.

813; *Matter of Plankinton Packing Company*, 6 N. L. R. B. 561; *Matter of Plankinton Packing Company*, 69 N. L. R. B. 920.

On February 20, 1945, the National War Labor Board issued a directive order requiring *inter alia*, that the Company and United Packinghouse Workers, C.I.O., hereinafter referred to as the Union, which had earlier been certified by the National Labor Relations Board as exclusive bargaining representative of the Company's employees (6 N.L.R.B. 561), enter into a contract containing maintenance of membership provisions. The order provided for inclusion in the contract of an "escape period" of 15 days during which employees who desired to withdraw from union membership should be free to do so while still remaining in the employment of the Company. It further provided that any disputes which might arise concerning intimidation of employees to join or remain members of the Union during such period were to be referred to an arbitrator appointed by the National War Labor Board. Pursuant to the order, and the contract executed pursuant thereto, the escape period terminated on March 9, 1945 (R. 118-119).

On or about March 6, 1945, during the "escape period", employee Stokes resigned from the Union (R. 127). On May 9, 1945, at the request of the Union, the Company discharged Stokes (R. 140).

Thereafter Stokes initiated proceedings before the Wisconsin Employment Relations Board (R.

117), claiming that the discharge resulted from his resignation from the Union and that the Company thereby committed an unfair labor practice under Section 111.06 (1) (c), of the Wisconsin Employment Peace Act which provides:

> "It shall be an unfair labor practice for an employer * * * to encourage * * * membership in any labor organization * * * by discrimination in regard to hiring, tenure or other terms or conditions of employment * * *."

At the hearing before the Wisconsin Board the Company contended that the State Board was without jurisdiction because the subject matter of the action was within the exclusive jurisdiction of the National Labor Relations Board (R. 122). The State Board rejected this contention. It further found that the discharge of Stokes at the request of the Union interfered with the right of Stokes to refrain from membership in the Union, and held that the discharge therefore constituted an unfair labor practice. It ordered the Company to cease and desist from such interference and to reinstate Stokes with back pay (R. 210-212).

The Company filed a petition to review and set aside the State Board's order in the Circuit Court for Milwaukee County, and the State Board filed a cross petition for enforcement (R. 112-203). The Circuit Court sustained the Company's contention that the State Board was without jurisdiction because "The National Board has * * * exclusive

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power to act in the controversy herein" (R. 101-112). It pointed out that the applicable provisions of the National Act and the provision of the Wisconsin Act upon which the State Board relied are identical; that the National Board had previously exercised jurisdiction over the employer involved; and that under controlling decisions of the Supreme Court of the United States, the State Board therefore had no jurisdiction to act. As an independent ground for decision the court also held that the directive order of the National War Labor Board, which provided for submission to arbitration of controversies concerning compulsion of employees to retain membership in the Union during the 15 day escape period, was applicable to the controversy and that the order of the Wisconsin Board was void because it conflicted with the directive order of the National War Labor Board. The court directed the State Board to dismiss the proceeding for lack of jurisdiction (R. 217).

The Supreme Court of the State of Wisconsin reversed. It held that the order of the National War Labor Board was without significance because the effect of all War Labor Board directives had been terminated by Presidential Order on December 31, 1945. It further held that there was no merit in the Company's contention that the National Labor Relations Board had exclusive jurisdiction of the controversy involved. It said: "Every argument made by the Company and the Union in sup-

port of their contention that the State Board was without jurisdiction is answered adversely to them by the opinion of this Court in *Wisconsin Employment Relations Board* v. *Algoma P. & V. Co.*, 252 Wis. 549, 32 N. W. 2d 417, affirmed [336 U. S. 301]." The court directed the Circuit Court to enter judgment enforcing the order of the State Board (R. 237).

ARGUMENT

The question presented in this case is virtually identical with the question presented in *Gilson Brothers* v. *Wisconsin Employment Relations Board*, No. 383, this Term. Both cases involve attempts by the Wisconsin Board to remedy, as unfair labor practices under state law, acts of employers subject to the National Act, which constitute unfair labor practices under Section 8(3) of the National Act, and Section 8(a)(3) of the Act, as amended. In the *Gilson* case the discharge was found by the State Board to constitute an unfair labor practice because it discouraged membership in a labor organization; in the instant case the discharge was found to be unfair because it improperly encouraged membership in a labor organization. The *Gilson* case arose under the amended Act; this case arose under the original Act. These differences are immaterial. Discharges of either kind are unfair labor practices both under Section 8 (3) of the original Act, and under Section 8 (a) (3) of the Act, as amended.

The provisions of the Wisconsin Act and the provisions of the National Act applicable to this

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case are parallel. Both statutes declare that it is an unfair labor practice for an employer, by discrimination in regard to hire or tenure of employment, to "encourage" membership in a labor organization. (Compare Section 111.06 (1) (c) 1, of the Wisconsin Act with Section 8 (3) of the National Act). It is precisely in such circumstances, as this Court held in *Bethlehem Steel Corp.* v. *New York State Labor Relations Board,* 330 U. S. 767, and *La Crosse Tel. Corp.* v. *Wisconsin Employment Relations Board,* 336 U. S. 18, that the jurisdiction of the National Board is exclusive. This Court pointed out in *Algoma Plywood Co.* v. *Wisconsin Employment Relations Board,* 336 U. S. 301, 306, that Section 10 (a) of the original National Act, which vested in the National Board "exclusive" power over matters defined therein as unfair labor practices, was designed "to preclude conflict in the administration of remedies for the practices proscribed by Section 8." Congress, in amending Section 10 (a), reaffirmed and made even more explicit the inhibition upon state authority to remedy conduct constituting an unfair labor practice under Section 8. *Algoma* case, *supra,* p. 313. The rule, under both the original and the amended Act, is that where "State and federal laws have parallel provisions" state action is barred, at least absent cession by the National Board (*ibid.*).

The Supreme Court of Wisconsin incorrectly thought that this case was controlled by the *Al-*

goma case, which sustained the authority of the State over closed shop agreements. But the instant case, unlike the *Algoma* case, involves no question concerning the effect of the proviso to Section 8 (3) of the Wagner Act, which exempted from the category of unfair labor practices discharges pursuant to closed-shop agreements executed in conformity with the terms of the proviso.

The instant case does not involve the respective areas of state and federal power in the field of agreements for union security. The maintenance of membership contract executed between the Company and the Union pursuant to directive order of the War Labor Board played no part in the discharge which is the subject of this case. Stokes was not discharged pursuant to the terms of that agreement, but in contravention of it. He had resigned from the Union during the escape period, and was therefore entitled, by the terms of the contract, to continue working as a non-member of the Union during the life of the agreement. The Wisconsin Board found that Stokes was discharged by the Company at the "request" of the Union. It did not find that that request, or the Company's action in granting it, stemmed from the contract. Moreover, since Stokes did not complain of the contract in bringing this action, the Wisconsin Board and courts did not even consider the legality of the maintenance of membership contract under Wisconsin law. No provision of the order directs the Company to re-

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frain from performing the contract according to its terms. It is evident, therefore, that the case is unaffected by the circumstance that the Company and the Union were, at the time of the discriminatory discharge, parties to a maintenance of membership agreement.

The question, then, is solely whether the discharge of an employee at the request of a labor organization, which encourages membership therein in violation of the National Act, may be treated as an unfair labor practice by a state board and remedied by it. We submit that in upholding the jurisdiction of the State Board under these circumstances the court below clearly erred.

CONCLUSION

The question herein presented is of substantial importance in the administration of the National Act. The Solicitor General, on behalf of the Board, respectfully urges that the petition for a writ of certiorari be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel.

NOVEMBER, 1949.

APPENDIX A

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> Sec. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment

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membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. II, 141, *et seq.*), are as follows:

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condi-

tion of employment as authorized in section 8 (a) (3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimina-

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tion against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

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